Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

(3)

NO. 95-1250

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WAYNE DOLCEFINO,

Petitioner,

vs.

THE HONORABLE ELIZABETH RAY,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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March 26, 1996

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner Wayne Dolcefino files this Reply Brief to address two arguments asserted in the Brief in Opposition to Dolcefino's Petition for Writ of Certiorari ("Brief in Opposition").

In the Brief in Opposition filed on behalf of Sylvester Turner — the plaintiff in the underlying libel suit and the real party in interest — Turner argues that he is not seeking to learn the identity of a confidential source. Rather, Turner asserts that he is merely attempting to interrogate Dolcefino about Dolcefino's contacts with a specific individual whom Turner alleges has knowledge of relevant facts.

Turner's efforts to frame the issue so that it does not involve disclosure of a confidential source are unavailing. Dolcefino testified repeatedly both in his deposition and before the Texas trial court that disclosure of the information sought by Turner would tend to reveal the identity of a confidential source. The fact that Turner did not state in his Motion to Compel Dolcefino to Testify that he was seeking the identity of a confidential source does not disguise the effect of Dolcefino's testimony, which would involve revealing information that is protected by the First Amendment. Nor is it significant that the trial court in its Orders requiring Dolcefino to testify did not specifically state that it was ordering him to reveal the identity of a confidential source. The Orders at issue have that effect, whether they state so or not.

Turner's argument in this regard would allow a party searching for the identity of a confidential source to continue to ask questions about a specific individual or individuals, without using the words "confidential source," and obtain by process of elimination what the party is precluded by the First Amendment from obtaining directly. Contrary to the assertions of Turner and the holding of the Texas trial court, if a party claims to be successful in identifying a confidential source by alternative means, he still is not entitled to compel the reporter to testify regarding that "identifiable person." (Brief in Opposition at 3). *See, e.g., LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986). To hold otherwise would

render completely meaningless the alternative means requirement of the balancing test employed by the federal courts of appeals when confidential information is sought from a reporter.

Turner also makes the argument, for the first time before this Court, that the name "Peary Perry" was uncovered through the "ordinary course of discovery" (Brief in Opposition at i), and intimates that it was a representative of another defendant in the underlying libel suit, KTRK Television, who provided the name. Turner also states that Dolcefino and the other defendants in the underlying libel case have admitted that Perry is a witness with knowledge of relevant facts. (Brief in Opposition at 6). Neither of these assertions or implications is accurate. In fact, in the trial court's Orders and in the Texas Court of Appeals' opinion, each court accepted the assertion Turner made at that time that Perry's identity was discovered by Turner's own means rather than through one of the defendants.

Once Turner believed he had identified Dolcefino's confidential source, he began to ask various witnesses in depositions whether they had ever heard the name "Peary Perry." One of those witnesses was an anchorwoman for KTRK Television who testified that the initial source for the broadcast at issue had mentioned the name "Perry." However, this fact does not support the assertion that KTRK employees "provided evidence about Perry's involvement." (Brief in Opposition at 2). Even if a KTRK employee had provided such evidence, there is no party other than Dolcefino who is capable of waiving constitutional rights that belong to Dolcefino and are for the benefit of the public at large. Thus, Turner's assertions in this regard are not only inaccurate but are also irrelevant to the issues before this Court — specifically, whether courts in Texas must recognize the constitutional protection afforded journalists against compelled disclosure of information that would tend to reveal the identity of a confidential source and whether courts in Texas must employ a proper balancing test to give effect to those protections. Where a court simply accepts an assertion by a public official libel plaintiff that a specified individual is a confidential source for the

broadcast of which he complains, and thereby compels disclosure of confidential information, those constitutional protections have not been appropriately recognized.

For these reasons, as well as those stated in Dolcefino's Petition for Writ of Certiorari, this case merits the Court's full consideration of the federal question presented by Dolcefino.

Respectfully submitted,

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March 26, 1996